

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

PAUL GARDNER,

Plaintiff,

v.

NAPHCARE, INC., *et al.*,

Defendants.

Case No. 3:24-cv-00277-MMD-CLB

ORDER

I. SUMMARY

Plaintiff Paul Gardner filed a complaint alleging that during his incarceration at Washoe County Detention Facility (“WCDF”), medical-provider Defendants¹ violated his civil rights under the United States Constitution, the Nevada Constitution, and the Americans with Disabilities Act (“ADA”). (ECF No. 1 (“Complaint”).) Gardner also brings general and professional negligence claims. (*Id.*) Defendant Naphcare, Inc. filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).² (ECF No. 8 (“Motion”).) Before the Court is the Report and Recommendation (“R&R”) of United States Magistrate Judge Carla L. Baldwin, recommending that the Motion be granted as to Gardner’s negligence claims (claims one, two and three), and denied as to his constitutional and ADA claims (claims four and five). (ECF No. 21.) Objections to the R&R were due October 18, 2024. (*See id.*) To date, no objections to the R&R have been filed. For the reasons explained below, the Court will adopt the recommendations in the R&R with respect to the majority

¹Defendants are Naphcare, Inc. (“Naphcare”), Michael Trebian, Michael Tover, Michael Behler, Frank Akpati, Dr. Larry Williamson, and Washoe County. (ECF No. 1.) Plaintiff refers to Trebian, Tover, and Buehler collectively as “Nurse Michael Doe,” asserting that the true identity of the individual responsible for the conduct at issue was withheld. (*Id.*)

²Gardner responded (ECF No. 13) and Naphcare replied (ECF No. 14).

1 of Gardner's claims. However, the Court will reject the R&R's recommendation to dismiss
 2 Plaintiff's professional negligence claims and will allow those claims to proceed.

3 **II. DISCUSSION³**

4 Plaintiff's claims arise from an incident in July 2022, when Gardner alleges that
 5 Naphcare's contracted medical providers at WCDF administered hydrogen peroxide
 6 instead of saline solution for his scleral contact lenses, leading to significant eye damage,
 7 continuing pain and worsening vision. (ECF No. 1.) Because there was no objection to
 8 the R&R, the Court is not required to conduct de novo review. *See United States v.*
 9 *Reyna-Tapia*, 328 F.3d 1114, 1116 (9th Cir. 2003) ("De novo review of the magistrate
 10 judges' findings and recommendations is required if, but *only* if, one or both parties file
 11 objections to the findings and recommendations.") (emphasis in original). Nevertheless,
 12 the Court will consider the recommendations in the R&R as to each of Naphcare's
 13 arguments for dismissal. *See* 28 U.S.C. § 636(b)(1) (providing that a district judge "may
 14 accept, reject, or modify, in whole or in part, the findings or recommendations made by
 15 the magistrate judge").

16 Judge Baldwin first recommends that the Court dismiss Plaintiff's general
 17 negligence claim because the claim sounds entirely in professional negligence. (ECF No.
 18 21 at 5.) The Court agrees that, because the negligence alleged involves healthcare
 19 providers rendering services—and given that Gardner does not otherwise address
 20 Naphcare's argument on this point—dismissal of the general negligence claim is
 21 appropriate. *See Limprasert v. PAM Specialty Hosp. of Las Vegas LLC*, 550 P.3d 825,
 22 831 (Nev. 2024).

23 Judge Baldwin next recommends that the Court dismiss Gardner's professional
 24 negligence and negligent supervision claims as time-barred by the one-year statute of
 25 limitations in medical malpractice actions. (ECF No. 21 at 5-7.) *See* NRS § 41A.097(2)
 26 ("[A]n action for injury or death against a provider of health care may not be commenced
 27

28 ³The Court incorporates by reference Judge Baldwin's description of the pertinent
 procedural and factual background provided in the R&R and adopts this background to
 the extent it is consistent with the Court's findings in this order.

1 more than 3 years after the date of the injury or 1 year after the plaintiff discovers or
2 through use of reasonable diligence should have discovered the injury, whichever occurs
3 first.”); *Yafchak v. S. Las Vegas Med. Invs., LLC*, 519 P.3d 37, 40 (Nev. 2022) (providing
4 that when the underlying tortfeasor is liable for professional negligence, NRS § 41A
5 applies to negligent hiring, training, and supervision claims). Here, the incident leading to
6 Plaintiff’s eye injuries occurred in July 2022, and the Complaint was filed nearly two years
7 later, in June 2024. Gardner argues, however, that the one-year limitation period should
8 be tolled because he repeatedly requested his medical records in and after August 2022,
9 and Naphcare intentionally withheld those records until Gardner’s 2024 release from
10 WCDF, knowing that Gardner could attempt to file suit. (ECF No. 13 at 4-8.) See NRS §
11 41A.097(4) (providing that the “time limitation is tolled for any period during which the
12 provider of health care has concealed any act, error or omission upon which the action is
13 based and which is known or through the use of reasonable diligence should have been
14 known to the provider of health care”).

15 Interpreting the allegations in the light most favorable to Plaintiff at the motion to
16 dismiss stage, the Court declines to determine as a matter of law that NRS § 41A.097(4)’s
17 tolling provision does not apply, and accordingly denies Naphcare’s Motion with respect
18 to the professional negligence claims. See *Winn v. Sunrise Hosp. & Med. Ctr.*, 277 P.3d
19 458, 462 (Nev. 2012) (noting that accrual date for the one-year limitation is generally a
20 question of fact, and the Court may determine the date as a matter of law only when the
21 evidence irrefutably shows the date on which a plaintiff was placed on inquiry notice). In
22 order to toll the limitation period, a plaintiff must show that (1) the provider “intentionally
23 withheld information,” and (2) “that this withholding would have hindered a reasonably
24 diligent plaintiff from procuring an expert affidavit.” *Kushnir v. Eighth Jud. Dist. Ct.*, 495
25 P.3d 137, 139 (Nev. Ct. App. 2021) (citing *Winn*, 277 P.3d at 464). Gardner asserts that
26 because WCDF and Naphcare prevented him from accessing his medical records for
27 more than a year, he could not identify the specific providers who mistakenly gave him
28 hydrogen peroxide, nor confirm the exact substance involved or the mechanism of the

1 injury in order to decide how to pursue legal action. (ECF Nos. 1 at 8-9; 13 at 2, 4-8; 13-
2 1.) Naphcare does not appear to argue there was a justification for refusing to provide the
3 records, or to assert that any withholding was unintentional. (ECF Nos. 8, 14.) And while
4 it is true that the immediate nature of Gardner's injury may make the alleged negligence
5 at issue here more easily discernable to a layperson than in cases involving other kinds
6 of medical injuries, the Court finds that Gardner has plausibly supported that lack of
7 access to *any* documented medical details about the incident could hinder a reasonably
8 diligent plaintiff's ability to obtain an expert affidavit. *See Kushnir*, 495 P.3d (holding that
9 the one-year statute of limitations period began to run against a physician who caused a
10 colon perforation during a diagnostic procedure when an expert received the patient's
11 complete medical records necessary to produce expert affidavit); *Winn*, 277 P.3d at 462-
12 64 (noting that a plaintiff must establish that they acted with "reasonable diligence" to
13 discover the alleged negligence).

14 Naphcare argues, in effect, that Gardner should have filed a complaint without his
15 medical records and simply moved to amend later. The Court finds this argument
16 insufficient to justify dismissal, particularly given that a premature dismissal could allow
17 Defendants to unfairly benefit from improper conduct. As Gardner notes, without medical
18 records, he would have had to choose blindly between pursuing a claim under Nevada's
19 *res ipsa* provision, which sets a rebuttable presumption of negligence under certain
20 circumstances, or bringing a claim requiring an expert affidavit without the benefit of the
21 rebuttable presumption. *See* NRS § 41A.100(1)(c); NRS § 41A.100(3). While the date of
22 inquiry notice does not depend on identification of all conceivable legal theories, discovery
23 of a *legal* injury generally means discovery of, at minimum, all facts supporting the
24 elements of a claim—that is, discovery of "both the fact of damage suffered and the
25 realization that the cause was the health care provider's negligence." *Siragusa v. Brown*,
26 971 P.2d 801, 807 (Nev. 1998) (quoting *Massey v. Litton*, 669 P.2d 248, 251 (Nev. 1983)).
27 *See also Winn*, 277 P.3d at 464 (citing Restatement (Second) of Torts § 538(2)(a) (1977))
28 (noting that a concealed matter is "material" if "a reasonable man would attach importance

1 to its existence or nonexistence in determining his choice of action”). In addition,
2 concealment of the identity of a tortfeasor may delay accrual of a discovery-based statute
3 of limitations when a plaintiff exercises due diligence in ascertaining the identity through
4 other means, *see Siragusa*, 971 P.2d at 807 (1998), and it is not apparent here to what
5 extent Gardner attempted to ascertain relevant information in spite of the alleged
6 concealment. Finally, although Gardner does not address this point in his opposition, his
7 Complaint alleges professional negligence “[d]uring the course of treatment,” and
8 includes numerous factual allegations going to Defendants’ failure to adequately respond
9 to his eye injury or provide follow-up care in the months and years after the June 2022
10 incident, causing additional damage. (ECF No. 1 at 4-8, 13-14.) This further complicates
11 a determination of the date on which a legal injury accrued. In short, the Court finds it
12 would be premature to conclude that Plaintiff’s professional negligence claims against
13 Naphcare are time-barred, and accordingly rejects the R&R’s recommendation for
14 dismissal of these claims.⁴

15 Judge Baldwin next recommends that the Court deny Naphcare’s Motion with
16 respect to Plaintiff’s municipal liability and ADA claims. (ECF No. 21 at 8-9.) The Court
17 adopts these recommendations. As to Plaintiff’s Eighth Amendment municipal liability
18 claim, Gardner adequately alleges that as an a WCDF contractor, Naphcare’s “policy or
19 custom was to prohibit inmates from receiving medical equipment or modalities [such as
20 eye patches, without considering objective factors].” (ECF No. 1 at 17.) *See also City of*
21 *Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989); *Monell v. New York City Dept. of Social*
22 *Services*, 436 U.S. 658 (1978). As to Plaintiff’s ADA disability discrimination claim, the
23 Court finds that Naphcare is a proper defendant under Title II as a result of its status as
24 a private entity contracting with Washoe County. *See Armstrong v. Wilson*, 124 F.3d
25 1019, 1023 (9th Cir.1997) (quoting 42 U.S.C. § 12131(1)) (“The ADA broadly “defines

26 ⁴The Court notes that Naphcare’s alleged concealment alone may not toll the
27 statute of limitations as to individual medical care providers, because tolling is appropriate
28 only with regard to a defendant who participates in the alleged problematic conduct. *See Winn*, 277 P.3d at 464. However, because none of the individual defendants have been served, the Court will not address the claims against them in this order.

1 'public entity' as 'any State or local government [and] any department, agency, special
2 purpose district, or other instrumentality of a State or States or local government.'").
3 Accordingly, the Court will adopt the R&R and allow these claims to proceed.

4 Finally, the Court adopts Judge Baldwin's recommendation to dismiss Defendants
5 Michael Buehler and Michael Tover, because Gardner states he has confirmed the true
6 identity of "Nurse Michael Doe" as Michael Trebian and has therefore agreed to dismiss
7 the two other "Michaels" originally named in the Complaint. (ECF Nos. 13 at 6 n. 3; 21 at
8 9.)

9 **III. CONCLUSION**

10 The Court notes that the parties made several arguments and cited to several
11 cases not discussed above. The Court has reviewed these arguments and cases and
12 determines that they do not warrant discussion as they do not affect the outcome here.

13 It is therefore ordered that Judge Baldwin's Report and Recommendation (ECF
14 No. 21) is adopted in part and rejected in part. The R&R is rejected as to the
15 recommendations to dismiss Plaintiff's claims for negligent training, supervision, and
16 retention (claim two) and professional negligence (claim three) and adopted as to all other
17 recommendations.

18 It is further ordered that Naphcare's Motion to Dismiss (ECF No. 8) is granted in
19 part and denied in part as specified in this order. The Motion is granted as to Plaintiff's
20 general negligence claim (claim one). The Motion is denied as to all other claims. Plaintiff
21 may proceed with his claims for negligent hiring, training, supervision and retention (claim
22 two), professional negligence (claim three), municipal liability under the U.S. and Nevada
23 Constitutions (claim four) and ADA discrimination (claim five).

24 It is further ordered that Defendants Michael Buehler and Michael Tover are
25 dismissed from this action with prejudice.

26 DATED THIS 21st Day of November 2024.



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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE